

1 THE HONORABLE JOHN C. COUGHENOUR
2
3
4
5
6
7

8 UNITED STATES DISTRICT COURT
9 FOR THE WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 DARK CATT STUDIOS HOLDINGS, INC., and
12 DARK CATT STUDIOS INTERACTIVE LLC,
13 on behalf of themselves and all others similarly
14 situated,

15 Plaintiffs,

16 v.

17 VALVE CORPORATION,

18 Defendant.

19 CASE NO.: 2:21-cv-00872-JCC

20 **DARK CATT PLAINTIFFS'
21 OPPOSITION TO MOTION TO
22 DISMISS CLASS ACTION
23 COMPLAINT**

24 NOTE ON MOTION CALENDAR:
25 Oct. 28, 2021

1 TABLE OF CONTENTS
2

	Page
I. INTRODUCTION	1
II. STATEMENT OF FACTS	2
III. LEGAL STANDARD.....	4
IV. ARGUMENT	4
A. Dark Catt Sufficiently Alleges Antitrust Injury from Valve's Conduct	4
1. Dark Catt Plausibly Alleges that Valve's Commission Is Supracompetitive	5
2. <i>Somers</i> Is Not Controlling and Does Not Support Valve's Argument	12
3. Dark Catt Alleges Non-Price Injuries	13
B. Dark Catt Alleges Valve Has Market Power in the Relevant Market	14
1. Valve's Factual Attack on the 75% Market Share Is Unavailing	14
2. Dark Catt Includes Significant Other Market Power Allegations	15
3. Two of the Three Claims Do Not Require Market Power	16
4. Valve Cannot Introduce Its Own Market Share Figure	16
5. The <i>Facebook</i> Opinion Does Not Help Valve's Argument.....	18
C. Dark Catt Plausibly Alleges Valve's Anticompetitive Conduct.....	18
1. Dark Catt Adequately Explains the Role of Steam Keys in Valve's Scheme.....	20
2. Dark Catt Pleads that Valve's Pricing and Marketing Provisions Form an Anticompetitive MFN	21
3. Dark Catt Alleges Valve Uses the Review System as Part of Its Scheme.....	23
D. Dark Catt States a Claim Under the Washington CPA.....	24
V. CONCLUSION.....	24

1 TABLE OF AUTHORITIES
2
3

Page

CASES

4 <i>Advanced Health-Care Serv. v. Radford Cnty. Hosp.</i> , 5 910 F. 2d 139 (4th Cir. 1990)	14
6 <i>Am. Nat'l Mfg. v. Select Comfort Corp.</i> , 7 2016 WL 9450472 (C.D. Cal. Sept. 28, 2016)	23
8 <i>Ashcroft v. Iqbal</i> , 9 556 U.S. 662 (2009).....	4, 6
10 <i>Aspen Skiing Co. v. Aspen Highlands Skiing Corp.</i> , 11 472 U.S. 585 (1985).....	20
12 <i>Beech-Nut Nutrition Corp. v. Gerber Prods. Co.</i> , 13 69 F. App'x 350 (9th Cir. 2003)	4
14 <i>Bell Atl. Corp. v. Twombly</i> , 15 550 U.S. 544 (2007).....	4, 11, 21
16 <i>Bio-Rad Labs., Inc. v. 10X Genomics, Inc.</i> , 17 483 F. Supp. 3d 38 (D. Mass. 2020)	12
18 <i>Blue Cross & Blue Shield of Ohio v. Bingaman</i> , 19 1996 WL 677094 (N.D. Ohio June 24, 1996).....	23
20 <i>Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.</i> , 21 429 U.S. 477 (1977).....	4
22 <i>Cal. Energy Co. v. S. Cal. Edison Co.</i> , 23 1992 WL 330263 (N.D. Cal. Sept. 22, 1992)	18
24 <i>Choker v. Pet Emergency Clinic, P.S.</i> , 25 2021 WL 934037 (E.D. Wash. Mar. 11, 2021).....	17
26 <i>City of Anaheim v. S. Cal. Edison Co.</i> , 27 955 F.2d 1373 (9th Cir. 1992)	6
28 <i>Cox v. Ametek, Inc.</i> , 29 2017 WL 4792424 (S.D. Cal. Oct. 24, 2017)	11
30 <i>Free Freehand Corp. v. Adobe Sys.</i> , 31 852 F. Supp. 2d 1171 (N.D. Cal. 2012)	5, 11, 18
32 <i>FTC v. Facebook, Inc.</i> , 33 2021 WL 2643627 (D.D.C. June 28, 2021).....	18
34 <i>FTC v. Qualcomm Inc.</i> , 35 969 F.3d 974 (9th Cir. 2020)	20

1	<i>FTC v. SureScripts LLC</i> , 424 F. Supp. 3d 92 (D.D.C. 2020).....	15, 21
2	<i>Gatan, Inc. v. Nion Co.</i> , 2017 WL 3478837 (N.D. Cal. Aug. 14, 2017)	5
4	<i>Glen Holly Entm't, Inc. v. Tektronix Inc.</i> , 343 F.3d 1000 (9th Cir. 2003)	4
5	<i>Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.</i> , 627 F.2d 919 (9th Cir. 1980)	7
7	<i>In re Elec. Books Antitrust Litig.</i> , 859 F. Supp. 2d 671 (S.D.N.Y. 2012).....	19
8	<i>Intel Corp. v. Fortress Inv. Grp. LLC</i> , 511 F. Supp. 3d 1006 (N.D. Cal. 2021).....	13
10	<i>Khoja v. Orexigen Therapeutics, Inc.</i> , 899 F.3d 988 (9th Cir. 2018)	6, 14, 17, 20
11	<i>Klem v. Wash. Mut. Bank</i> , 176 Wn.2d 771, 295 P.3d 1179 (2013).....	16
13	<i>Lazy Y. Ranch LTD v. Behrens</i> , 546 F.3d 580 (9th Cir. 2008)	8
14	<i>Lorain J. Co. v. United States</i> , 342 U.S. 143 (1951).....	20
16	<i>Metronet Servs. Corp. v. Qwest Corp.</i> , 2001 WL 765167 (W.D. Wash. Apr. 16, 2001).....	9
17	<i>Newcal Indus. v. Ikon Office Sols.</i> , 513 F.3d 1038 (9th Cir. 2008)	14
19	<i>Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.</i> , 883 F.2d 1101 (1st Cir. 1989).....	21, 22
20	<i>Rebel Oil Co. v. Atl. Richfield Co.</i> , 51 F.3d 1421 (9th Cir. 1995)	15
22	<i>REX - Real Est. Exch. Inc. v. Zillow Inc.</i> , 2021 WL 3930694 (W.D. Wash. Sept. 2, 2021).....	24
23	<i>Romero v. Securus Techs., Inc.</i> , 216 F. Supp. 3d 1078 (S.D. Cal. 2016).....	11
25	<i>Simon & Simon, PC v. Align Tech., Inc.</i> , 2021 WL 1309299 (N.D. Cal. Apr. 8, 2021)	9
26	<i>Sitzer v. Nat'l Ass'n of Realtors</i> , 420 F. Supp. 3d 903 (W.D. Mo. 2019)	24

1	<i>SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc.</i> , 88 F.3d 780 (9th Cir. 1996)	19
2	<i>Somers v. Apple, Inc.</i> , 729 F.3d 953 (9th Cir. 2013)	12
3		
4	<i>Spectrum Sports, Inc. v. McQuillan</i> , 506 U.S. 447 (1993).....	16
5		
6	<i>Staley v. Gilead Scis., Inc.</i> , 446 F. Supp. 3d 578 (N.D. Cal. 2020).....	23
7		
8	<i>Starr v. Baca</i> , 652 F.3d 1202 (9th Cir. 2011)	4
9		
10	<i>Tele Atlas N.V. v. NAVTEQ Corp.</i> , 2008 WL 4911230 (N.D. Cal. Nov. 13, 2008)	21
11		
12	<i>Thompson v. Clear Channel Commc'ns, Inc.</i> , 247 F.R.D. 98 (C.D. Cal. 2007).....	13
13		
14	<i>Top Rank, Inc. v. Haymon</i> , 2015 WL 9948936 (C.D. Cal. Oct. 16, 2015).....	12
15		
16	<i>United States v. Apple, Inc.</i> , 791 F.3d 290 (2d Cir. 2015).....	23
17		
18	<i>United States v. Blue Cross Blue Shield of Mich.</i> , 809 F. Supp. 2d 665 (E.D. Mich. 2011).....	22
19		
20	<i>United States v. Delta Dental of R.I.</i> , 943 F. Supp. 172 (D.R.I. 1996).....	22
21		
22	<i>United States v. Microsoft Corp.</i> , 253 F.3d 34 (D.C. Cir. 2001).....	20
23		
24	<i>United States v. Ritchie</i> , 342 F.3d 903 (9th Cir. 2003)	17
25		
26	<i>W. Penn Allegheny Health Sys., Inc. v. UPMC</i> , 627 F.3d 85 (3d Cir. 2010).....	4
27		
28		
29	<i>Wi-LAN Inc. v. LG Elecs., Inc.</i> , 382 F. Supp. 3d 1012 (S.D. Cal. 2019).....	5
30		
31	<i>William O. Gilley Enters. v. Atl. Richfield Co.</i> , 588 F.3d 659 (9th Cir. 2009)	4, 5
32		

RULES

26	Fed. R. Civ. P. 12(b)(6).....	<i>passim</i>
----	-------------------------------	---------------

MISCELLANEOUS

Arthur Zuckerman, *75 Steam Statistics: 2020/2021 Facts, Market Share & Data Analysis*, Compare Camp (May 15, 2020), <https://comparecamp.com/steam-statistics.....> 14, 16, 17

1 **I. INTRODUCTION**

2 In its Motion to Dismiss Dark Catt Plaintiffs' Complaint (ECF No. 38), Valve Corporation
 3 disputes Dark Catt's well-pleaded factual allegations, mischaracterizes those facts, and imports the
 4 Wolfire Plaintiffs' allegations from a related proceeding as if those allegations are in Dark Catt's
 5 Complaint. These are improper and ineffectual challenges under Federal Rule of Civil Procedure
 6 12(b)(6). A defendant cannot rewrite a complaint to support its motion to dismiss, nor can it ask
 7 the Court at the pleadings stage to adjudicate which factual positions will eventually win out.

8 Valve first argues Dark Catt has not alleged antitrust injury because, Valve claims, its
 9 commission rate is not supracompetitive, a conclusion drawn from its ability to charge the same
 10 rate for almost twenty years. Length of time does not determine whether the commission rate is
 11 higher than it would be in a competitive market. Valve's contention ignores Dark Catt's detailed
 12 allegations explaining why the rate would be lower during the class period in the absence of
 13 Valve's wrongful conduct.

14 Valve next asks the Court to look at documents outside the Complaint to contest the truth
 15 of Dark Catt's allegation that Valve has a 75% market share. Valve asks the Court to reject the
 16 part of the cited article giving the 75% market share estimate in favor of other information, and to
 17 conclude 75% must be too high. This contention ignores the pleading standard. Valve similarly
 18 disregards Dark Catt's additional factual allegations establishing Valve's market power: its
 19 dominance in a properly defined relevant market, barriers to entry, supracompetitive pricing, and
 20 restricted output on third-party stores.

21 In a final salvo, Valve argues Dark Catt has not alleged anticompetitive conduct sufficient
 22 to state its antitrust claims. While continuing to refuse to accept Dark Catt's well-pleaded factual
 23 allegations as true or draw reasonable inferences in Dark Catt's favor, Valve adds another legal
 24 error. It disaggregates Dark Catt's allegations of Valve's monopolistic scheme into individual acts
 25 to be viewed only in isolation. Valve chooses an individual allegation in the Complaint, provides
 26 Valve's counter-story, insists that the particular example does not state a claim, and moves to
 27 another allegation to consider in isolation. Valve's intertwined actions cannot be disassociated and

1 dismissed; they are each an integral part of Valve’s monopolistic scheme.

2 Valve’s arguments are not proper under Rule 12(b)(6), and its motion should be denied.

3 **II. STATEMENT OF FACTS**

4 Plaintiffs Dark Catt Studios Holdings, Inc. and Dark Catt Studios Interactive LLC
 5 (collectively “Dark Catt”) allege that Valve has attempted to monopolize and maintained its
 6 monopoly in the worldwide market for personal computer (“PC”) game distribution, including
 7 through its Steam online game store. Dark Catt alleges a range of exclusionary conduct that harms
 8 Publishers¹ who have no choice but to do business with Valve to gain access to a substantial
 9 number of PC gaming customers. As a practical matter, Publishers need to be able to distribute
 10 their games and add-on products and services via Steam to have any meaningful access to the PC
 11 gaming ecosystem. Compl. ¶¶ 20, 117-26 (ECF No. 1). Valve’s illegal dominance stems from
 12 three types of conduct.

13 First, Valve imposes pricing and marketing restrictions on Publishers to control their
 14 activity on other stores when selling the same games as available on Steam. *Id.* ¶¶ 9, 44, 46, 50.
 15 Publishers cannot offer a lower price or a temporary exclusivity period on another store. This
 16 harms their ability to monetize their PC games because they cannot lower their price to try to
 17 increase sales without sacrificing profits (given the lower percentage of the sales price the other
 18 store will take); nor can they negotiate financial incentives for exclusives. *Id.* ¶¶ 9-10, 47-49, 54-
 19 55, 62, 72. Further, Publishers have little incentive to offer lower prices on other stores despite
 20 those stores’ lower revenue shares since they will have to correspondingly lower the price on
 21 Steam. Publishers will then make less money on each Steam sale. *Id.* ¶¶ 130, 133.

22 Second, Valve leverages its authentication codes, called Steam keys, which it has built into
 23 an industry standard, to enforce its pricing and marketing restrictions and limit Publishers’ sales
 24

25 ¹ The Complaint uses “Developer” to refer to parties who “contracted with Valve Corporation to
 26 distribute a PC game via Steam and sold such game,” meaning the entities directly harmed by Valve’s
 27 alleged practices. Compl. ¶ 202 (defining proposed class). The Court’s recent Order referred to those
 28 directly harmed entities as “Publishers.” *See* Order at 2 n.1, ECF No. 52 (Oct. 5, 2021). Consistent with
 the Court’s usage, Dark Catt uses “Publisher” here to clarify, as alleged in its Complaint and proposed
 class, it is not referring to the entities who were indirectly harmed by Valve’s conduct.

1 on other stores. *Id.* ¶¶ 13-14, 144. Valve may not be obligated to provide keys in the first instance.
 2 But having decided to offer them and propel them into a standard, Valve now uses them to build
 3 and maintain its monopoly. *Id.* ¶¶ 148-49. Valve no longer allows Publishers to generate keys for
 4 their games and instead provides keys to Publishers at its own discretion and whim. *Id.* ¶¶ 152-53.
 5 Steam keys allow Valve to both track and limit the number of sales on third-party stores that sell
 6 Steam-enabled games and provide a coercive mechanism for its other restrictions on Publishers,
 7 as it can delay, limit, or cut off access to Publishers who violate its rules. *Id.* ¶¶ 154, 158-59.

8 Third, Valve uses its control over a game's visibility to punish Publishers that threaten its
 9 control of the PC game ecosystem. *Id.* ¶ 16. Valve has notified users of a Publisher's exclusive
 10 offering on another store, resulting in an attack on the Publisher's Steam store or game page, and/or
 11 derogatory comments on other social media sites. *Id.* ¶¶ 169-72. While Steam users post these
 12 reviews, Valve has a policy of not deleting them, including those that are irrelevant to the game
 13 and abusive, in violation of its own rules. *Id.* ¶¶ 182-83, 185. Negative reviews can have a
 14 significant influence on a game's visibility and sales. *Id.* ¶¶ 178, 181, 184.

15 This conduct has given Valve market power in the market for PC game distribution. Valve
 16 is able to control prices in the entire market through its requirement that Publishers not offer their
 17 games or add-on content at a lower price on another store if they are also sold on Steam. *Id.* ¶¶ 9,
 18 62. Valve is able to exclude competitors by preventing rivals from attracting gamers through better
 19 pricing and marketing, such as exclusive offerings. *Id.* ¶¶ 11, 62-63, 72.

20 Valve's anticompetitive pricing and marketing restrictions have directly injured Dark Catt
 21 and the proposed Publisher class by forcing them to pay an inflated revenue share and limiting
 22 their options to sell PC games on other stores. *Id.* ¶¶ 20, 47-49, 62. Valve's restrictions prevent
 23 Publishers from obtaining better distribution terms from other stores in exchange for an exclusive
 24 promotion. *Id.* ¶¶ 48-49. The restrictions also prevent rivals from attracting a user base because
 25 Publishers cannot offer lower prices on another store or exclusive offerings to bring users to a
 26 competing store. By preventing rivals from competing effectively, Valve eliminates competitive
 27
 28

1 pressure it would otherwise face to lower its commission rate and cease its restrictions on
 2 Publishers. *Id.* ¶¶ 47-49, 72-73, 143, 195-99.

3 **III. LEGAL STANDARD**

4 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
 5 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S.
 6 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In evaluating a
 7 motion to dismiss, “[w]hen there are well-pleaded factual allegations, a court should assume their
 8 veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Id.* at 679.
 9 Further, “[i]f there are two alternative explanations, one advanced by defendant and the other
 10 advanced by plaintiff, both of which are plausible, plaintiff’s complaint survives a motion to
 11 dismiss under Rule 12(b)(6).” *Starr v. Baca*, 652 F.3d 1202, 1216-17 (9th Cir. 2011).

12 Antitrust claims must be “plausible in light of basic economic principles.” *William O.*
 13 *Gilley Enters. v. Atl. Richfield Co.*, 588 F.3d 659, 662 (9th Cir. 2009) (internal quotation omitted).
 14 But antitrust claims (that do not sound in fraud) have “no special pleading rule requiring greater
 15 factual specificity.” *Beech-Nut Nutrition Corp. v. Gerber Prods. Co.*, 69 F. App’x 350, 351 (9th
 16 Cir. 2003); *see also W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 98 (3d Cir. 2010).

17 **IV. ARGUMENT**

18 **A. Dark Catt Sufficiently Alleges Antitrust Injury from Valve’s Conduct**

19 Antitrust injury is an “injury of the type the antitrust laws were intended to prevent and that
 20 flows from that which makes defendants’ acts unlawful.” *Brunswick Corp. v. Pueblo Bowl-O-Mat,*
 21 *Inc.*, 429 U.S. 477, 489 (1977). The Ninth Circuit requires five elements: “(1) unlawful conduct,
 22 (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful,
 23 and (4) that is of the type the antitrust laws were intended to prevent,” and (5) “that the injured
 24 party be a participant in the same market as the alleged malefactors.” *Glen Holly Entm’t, Inc. v.*
 25 *Tektronix Inc.*, 343 F.3d 1000, 1008 (9th Cir. 2003) (internal quotations and citation omitted).
 26 Valve at most challenges the first and second elements in arguing that supracompetitive pricing is
 27 not plausible and therefore Dark Catt could not have been injured. *See* Mot. at 7-12.

1 Valve's arguments are premised on two flawed propositions that are incorrect as to the
 2 factual allegations, economic principles, and governing law. Fundamentally, Valve's antitrust
 3 injury arguments ignore the basic principles of evaluating a Rule 12(b)(6) motion: "All allegations
 4 of material fact are taken as true and construed in the light most favorable to the non-moving
 5 party." *Atl. Richfield Co.*, 588 F.3d 659 at 662.

6 **1. Dark Catt Plausibly Alleges that Valve's Commission Is Supracompetitive**

7 Valve's first flawed proposition is that Valve has maintained its 30% commission since the
 8 mid-2000s and so the rate cannot be supracompetitive. Mot. at 7-8. Because the rate is supposedly
 9 not supracompetitive, Dark Catt has not alleged antitrust injury from having paid the rate. *Id.* This
 10 circular syllogism fails at the outset. It ignores Dark Catt's allegations that Valve's anticompetitive
 11 conduct allows it to keep this high rate when it would have fallen in a competitive market.

12 Dark Catt alleges that it and the proposed Publisher class have been harmed by paying an
 13 inflated fee to Valve to distribute their PC games on Steam. Paying too high of a price is a textbook
 14 antitrust injury. *See Free Freehand Corp. v. Adobe Sys.*, 852 F. Supp. 2d 1171, 1185 (N.D. Cal.
 15 2012) (noting supracompetitive prices and decreased innovation "are the type of injuries that
 16 commonly satisfy the antitrust standing requirement" and collecting cases); *Wi-LAN Inc. v. LG
 17 Elecs., Inc.*, 382 F. Supp. 3d 1012, 1024 (S.D. Cal. 2019); *Gatan, Inc. v. Nion Co.*, 2017 WL
 18 3478837, at *5 (N.D. Cal. Aug. 14, 2017). The Complaint provides ample factual allegations to
 19 support the reasonable inference that Dark Catt (and the proposed Publisher class) was harmed as
 20 a direct result of Valve's conduct.

21 As an initial matter, supracompetitive pricing is determined by a comparison to the price
 22 that would have prevailed if there was competition without the anticompetitive conduct, *i.e.*, the
 23 "but-for world." Valve mistakes the symptom (a flat commission rate) for the disease
 24 (monopolization) in arguing that the Court should look only at the commission rate over time to
 25 determine if Dark Catt has plausibly alleged it was above the competitive level during the class
 26 period, and accordingly injured those who paid it. If not infected with Valve's monopolistic
 27 practices, a competitive PC game distribution market would have pushed Valve to lower its
 28

1 commission rate, not maintain it.

2 Determining whether Dark Catt has sufficiently pled antitrust injury—through paying an
 3 actual commission rate above the but-for competitive rate—requires examining the “overall
 4 combined effect” of Valve’s conduct. *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376,
 5 1378 (9th Cir. 1992). The Complaint describes in detail a series of anticompetitive acts that Valve
 6 used to obtain and maintain a monopoly in PC game distribution, including pricing and marketing
 7 restrictions and use of Steam keys to control Publishers’ activity on other stores. It provides
 8 examples of how these restrictions have harmed both Publishers who attempted to escape its
 9 monopoly and rivals who have been unable to enter and compete effectively in the market for PC
 10 game distribution. Compl. ¶¶ 68-73, 117-19, 122-25, 163-67, 172-79, 186, 193-200.

11 Without Valve’s restrictions, Publishers would have other viable options to distribute their
 12 games to purchasers and would no longer be reliant on Steam to reach customers. Publishers
 13 instead could negotiate more favorable distribution terms with Valve and its rivals, including a
 14 lower revenue share percentage. *Id.* ¶¶ 72-73. In a competitive, but-for world without Valve’s
 15 illegal conduct, Dark Catt and similarly situated Publishers would have paid lower commissions
 16 to Valve because competition would have pushed down the commission rate Valve could charge.

17 Valve does not contend these factual allegations are legal conclusions that need not be
 18 accepted as true. *See Iqbal*, 556 U.S. at 678-79. It just does not like them. And so it seeks to
 19 introduce its own preferred contentions and explanations, thereby inverting the pleading standard.
 20 *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (“If defendants are
 21 permitted to present their own version of the facts at the pleading stage . . . it becomes near
 22 impossible” for a plaintiff to demonstrate a plausible claim for relief).

23 **a. The Commission Rate’s Constancy Is Not Informative**

24 To support its argument that the “only reasonable inference” from Dark Catt’s Complaint
 25 is that the 30% commission is not supracOMPETITIVE, Valve impermissibly turns to matters outside
 26 the Complaint and non sequiturs. Mot. at 8. Valve contends that “it took at least five and likely
 27 several more years” for Valve to become dominant and “it went from zero to an alleged 75%
 28

1 market share" without raising its commission. *Id.* These assertions have no significance to whether
 2 Dark Catt has sufficiently alleged that it and the Publisher class were injured by paying the 30%
 3 commission charged during the class period.² Valve then compounds its flawed arguments:

4 First, Valve simply assumes that the 30% rate was competitive in 2005, which has no
 5 factual basis and is not at issue here. Even so, the relevant market looked much different then, with
 6 PC games sold as physical copies on discs at brick-and-mortar retailers. *See* Compl. ¶¶ 4, 120.

7 Second, even if the rate was competitive in 2005, there is no legal or economic basis to
 8 infer that it is competitive in 2017 (when the class period begins) or today. Valve ignores the
 9 changes in the market, detailed in the Complaint, that it encouraged and exploited to gain its
 10 monopoly. *See* Mot. at 11 (noting the Complaint "alleges an evolving gaming landscape"). It is
 11 implausible to assume, as Valve does, that in a competitive environment Valve's rate would remain
 12 unchanged through the shift to digital sales, online gameplay, and increased efficiencies.

13 Third, a monopolist or attempted monopolist can be liable for conduct that would not be
 14 actionable if undertaken by a company with "zero market share." *Hunt-Wesson Foods, Inc. v. Ragu*
 15 *Foods, Inc.*, 627 F.2d 919, 925 (9th Cir. 1980) ("What may be legal for the company lacking
 16 substantial market power may be illegal for the firm with such power.").

17 Lastly, Valve recently did lower its commission rate for certain high-selling games in the
 18 face of an emerging competitor: Epic Games Store. Compl. ¶¶ 113-14. Valve's attempt to paint
 19 this reduction as "price competition" and "volume discounts," Mot. at 11-12, cannot be squared
 20 with its argument that its otherwise flat 30% commission is de facto competitive given its long
 21 duration. Even if Valve could introduce an alternative explanation on a motion to dismiss, its
 22 argument that the lowered commission rate reflects a "volume discount" from "cost savings" falls
 23 short. *Id.* The "discount," which applies once a sales revenue threshold is reached, is unrelated to
 24 Valve's costs, for example, the number of transactions Valve processes to reach the threshold or
 25 the amount of data delivered. Valve has only speculation to support this argument, which cannot

27 ² While Dark Catt does not need to allege the exact moment when Valve's monopoly began, particularly
 28 since it brings monopolization **and** attempted monopolization claims, it certainly has not alleged that the
 30% commission ever reflected a competitive rate. Valve has no basis for this assumption.

1 replace the factual allegations in the Complaint and plausible inferences drawn therefrom.

2 **b. A Quality-Adjusted Commission Rate Is a Faulty Concept**

3 Continuing to impermissibly allege its own version of facts, Valve next contends its
 4 “quality-adjusted commission rate” has fallen. Mot. at 8-10. The Complaint does not contain any
 5 allegation from which the reasonable inference could be drawn that “Valve has enhanced Steam
 6 with many features prized by developers and gamers alike.” *Id.* at 8. Tellingly, Valve cites only
 7 Part II of its own Motion, which includes “facts” with no basis in the Complaint, and does not
 8 specify what these supposedly new and valuable features are, when they were added, or why they
 9 support the 30% commission as a competitive rate.³ Valve continues to misunderstand that a
 10 supracompetitive rate is determined with reference to the “but-for” world without the monopolistic
 11 conduct, not some prior version of Steam with fewer features.

12 Regardless, the idea of a quality-adjusted **commission rate**, compared to a quality-adjusted
 13 **price**, is economically nonsensical. Valve charges 30% of the purchase price set by the Publisher.
 14 The “quality” of its service is no different for a game that costs \$60 than a game that costs \$10,
 15 but Valve is paid \$18 versus \$3 for providing the same distribution service and quality.

16 **c. The Superior Product Theory Lacks Support**

17 Putting aside Valve’s argument that it is charging a **lower** relative commission given its
 18 supposed quality, and an even lower “volume discount” commission for high-selling games, Valve
 19 then claims that it is justified in charging a **higher** commission because of its quality. Valve’s
 20 contention that Steam is a superior product that rightly commands a higher price attempts to
 21 manufacture a factual dispute, just like its quality-adjusted commission argument. Mot. at 10-12.
 22 And it is just as out of place on a motion to dismiss.

23 Valve improperly seeks to introduce extrinsic facts and draw interpretations of the
 24 Complaint in the light most favorable to Valve—that Steam’s dominance comes from higher
 25 quality rather than Valve’s challenged conduct. *See Lazy Y. Ranch LTD v. Behrens*, 546 F.3d 580,

26 ³ Dark Catt’s allegations are that Publishers need to use Steam’s features to access the PC distribution
 27 market due to Valve’s anticompetitive conduct, not that Publishers “prize[]” Steam’s features. Compl. ¶¶
 28 9, 11, 117, 119. Valve cannot invent its own facts to argue Dark Catt’s allegations are implausible.

1 588 (9th Cir. 2008). An antitrust plaintiff has no burden at the pleading stage to “rule out other
 2 possible explanations” for defendants’ conduct; it does not need to identify “potential rationales”
 3 and then “explain why each of them could not conceivably explain the defendant’s action.” *Simon*
 4 & *Simon, PC v. Align Tech., Inc.*, 2021 WL 1309299, at *6 (N.D. Cal. Apr. 8, 2021).

5 **d. Rising Demand Does Not Justify the Commission Rate**

6 Valve’s attempt to rely on the “price-increasing effect of rising demand” is similarly
 7 misplaced as it requires output to be decreasing. Mot. at 11 (quoting *Metronet Servs. Corp. v.*
 8 *Qwest Corp.*, 2001 WL 765167 (W.D. Wash. Apr. 16, 2001)). It elsewhere argues that output is
 9 increasing. *Id.* at 8 (“the industry saw substantial growth in both output and demand”), 11 (“volume
 10 discounts Valve added in 2018”), 13 (“the facts that are alleged show an increase in these non-
 11 price metrics” referencing “output, quality, innovation, or choice”). Valve’s citation to the growth
 12 of Steam says nothing about the entire relevant market or output in the but-for world without
 13 Valve’s wrongful conduct. *Id.* at 11, 13. Valve’s self-contradictory statements are not a basis to
 14 dismiss Dark Catt’s claims.

15 **e. The 30% Rate Was Not Subject to “Intense Competition”**

16 Valve’s final attempts to argue Dark Catt’s injury allegations are implausible distort Dark
 17 Catt’s allegations. Valve contends that Dark Catt’s example of a Publisher making more money
 18 by selling at a lower price on a store offering a lower revenue share than Valve, Mot. at 11 (citing
 19 Compl. ¶ 196), is at odds with “numerous examples of developers taking advantage of just such
 20 lower commission stores, and thus reaping all of the benefits.” *Id.* at 11 (citing Compl. ¶¶ 164,
 21 172, 176, 177). This is a nonsensical comparison divorced from Dark Catt’s allegations.

22 The hypothetical in Complaint ¶ 196 notes that a Publisher could make more money on
 23 each sale even at a lower retail price, likely also increasing its total sales given the lower price, *if*
 24 Valve did not require the Publisher to keep its prices at the same level as on Steam. Compl. ¶¶
 25 196-97. But Valve *does* require the Publisher to offer the same price on Steam, undermining the
 26 Publisher’s incentive to lower its retail price on the other store despite the lower commission. *Id.*
 27 ¶¶ 130, 197-98. The examples of Publishers attempting to take advantage of lower commissions
 28

1 and other favorable terms offered by Epic Games Store do not render this hypothetical a “fallacy”
 2 because, as Valve admits, the Publishers were unable to sell “concurrently” on Steam. They had
 3 to choose to lose out on access to the vast majority of the market controlled by Valve if they wished
 4 to offer lower prices or a temporary exclusive elsewhere.

5 These Publishers tellingly returned to Steam after a temporary exclusivity period with
 6 Epic,⁴ illustrating that Publishers remain dependent on Steam for access to the broad market and
 7 were punished for their disloyalty to Steam. Compl. ¶¶ 164 (“Valve would not authorize Steam
 8 keys”); 172 (“Valve issued a statement criticizing the exclusive . . . ‘This led to a bunch of
 9 negative review spamming on the previous Metro games’”); *see also id.* ¶¶ 176, 178. These
 10 Publishers’ desperation to get out from under Valve’s monopoly do not call into question Dark
 11 Catt’s allegations of antitrust injury; they bolster them.

12 Similarly, Valve brazenly distorts Dark Catt’s allegations about Steam’s potential rivals.
 13 Far from facing “nearly twenty years of intense competition,” the cited paragraphs describe how
 14 competitors, whether small or large, have not been able to compete with Valve due to its unlawful
 15 restrictions on Publishers. Mot. at 9. Valve selectively quotes from Dark Catt’s allegations to
 16 concoct a contrary claim of “intense competition.” For example, Valve quotes only the bolded text
 17 from the following allegations, *id.*, while omitting the context and real meaning:⁵

- 18 • “Even other **billion-dollar companies with popular PC games**, similar to Epic, have been
 19 unable to compete with Steam in the market for PC game distribution.” Compl. ¶ 67.
- 20 • “Valve’s practices have also harmed others . . ., including Valve’s would-be competitors,
 21 third-party storefronts like Epic Games Store, Electronic Arts’ Origin, Microsoft’s store,
 22 Tiny Build’s store, and Discord’s store, which have been consistently unable to make
 23 incursions on Steam’s market share despite pursuing **more efficient business models** and
 24 offering **more favorable opportunities for Developers.**” *Id.* ¶ 21.

25
 26 ⁴ The exception is indie studio Glumberland, which is using a “revenue guarantee” from Epic to
 27 “continue to improve the game.” Compl. ¶ 177.

28 ⁵ The same is true of the other allegations Valve quotes. Mot. at 9 (also citing Compl. ¶¶ 69, 70, 71,
 79, 81, 96, 193).

- 1 • “EA created its Origin store and game launcher in 2011 . . . [and] stopped releasing its
2 games on Steam at that time. Despite the draw of its **popular franchises** such as FIFA, the
3 Sims, and Battlefield, EA was unable to break through Valve’s anticompetitive tactics in
4 the PC game distribution market and returned its games to Steam in 2020 to ‘be where the
5 players are.’” *Id.* ¶ 68.
- 6 • “Even if they could overcome the financial barriers to entry, it would be almost impossible
7 to attract a user base due to Valve’s monopoly power and anticompetitive conduct to
8 prevent new entry. **Industry behemoths** like EA have been unable to gain market share
9 because of Valve’s conduct.” *Id.* ¶ 119.

10 What is plainly alleged is that a number of sophisticated, well-funded companies⁶ have been unable
11 to overcome Valve’s anticompetitive practices to gain share and provide a competitive restraint on
12 Valve, including forcing its commission rate down to a competitive level. Far from supporting
13 Valve’s alternative narratives, these failures illustrate Valve’s ability to exclude competitors
14 through its restrictions on Publishers, control of Steam keys, and pattern of punishing Publishers.

15 In other words, Valve charges a fee in excess of what it would be able to charge if it did
16 not exclude rivals through the wrongful conduct. Dark Catt and all the other Publishers who sold
17 their PC games on Steam suffered antitrust injury as a result.

18 That Valve’s 30% fee is above the competitive rate and injured Publishers is not only
19 plausible under *Twombly*, but is the most plausible inference to be drawn from the failure of these
20 potential rivals to make inroads into Valve’s market power and force down its supracompetitive
21 fee. *See Free Freehand Corp.*, 852 F. Supp. 2d at 1182 (“[I]t is reasonable to infer that” conduct
22 that “made it more difficult for potential competitors . . . to enter the market,” combined with
23 existing barriers like “installed user bases and adoption as the standard” harmed competition).

24
25
26

27 ⁶ Valve also attempts to rely on allegations from the *Wolfire* Complaint about Amazon. The *Wolfire*
28 Complaint is not incorporated by reference in Dark Catt’s Complaint nor can the Court take judicial notice
 of the factual truth of the assertions. *See Romero v. Securus Techs., Inc.*, 216 F. Supp. 3d 1078, 1084 n.1
 (S.D. Cal. 2016); *Cox v. Ametek, Inc.*, 2017 WL 4792424, at *4 (S.D. Cal. Oct. 24, 2017).

1 **2. *Somers* Is Not Controlling and Does Not Support Valve’s Argument**

2 The second flawed proposition underlying Valve’s argument that Dark Catt has not alleged
 3 antitrust injury stems from the Ninth Circuit’s decision in *Somers v. Apple, Inc.*, 729 F.3d 953 (9th
 4 Cir. 2013). Valve contends *Somers* controls the outcome here simply because it involved an
 5 allegation that the defendant did not change its prices. The stability of Valve’s commission rate
 6 does not undercut the plausibility of Dark Catt’s allegation that the rate is above the competitive
 7 level. That determination cannot be made without examining the underlying exclusionary conduct
 8 that supports the alleged monopolist’s real-world price.

9 Contrary to Valve’s assertion, the facts here are distinguishable from *Somers*. Valve does
 10 not set prices to consumers as Apple did in determining the generally applicable price for digital
 11 song downloads. Valve contractually requires Publishers not to set a lower retail price on another
 12 storefront—preventing the very price competition the Ninth Circuit noted that Apple faced from
 13 Amazon. That is, Valve’s pricing and marketing restrictions have prevented the “presence of a
 14 competitor” and “increased competition” that would “generally lower[] prices.” *Somers*, 729 F.3d
 15 at 964. Valve’s consistent commission rate therefore does not “render[] implausible” Dark Catt’s
 16 (non-conclusory) allegations that Valve’s restrictions on Publishers excluded competitors and
 17 allowed it to charge a commission rate higher than the one that would prevail in a competitive
 18 market. *Cf. id.* (“The fact that Apple continuously charged the same price for its music irrespective
 19 of the absence or presence of a competitor renders implausible Somers’ conclusory assertion that
 20 Apple’s software updates affected music prices.”).

21 Valve’s other examples of insufficient allegations of supracompetitive pricing bear even
 22 less resemblance to Dark Catt’s claims. *See* Mot. at 7. Two cases are challenges to patent
 23 acquisitions and subsequent aggregated licensing. *Bio-Rad Labs., Inc. v. 10X Genomics, Inc.*, 483
 24 F. Supp. 3d 38, 58-60 (D. Mass. 2020) (Clayton Act § 7 claim); *Intel Corp. v. Fortress Inv. Grp.*
 25 LLC, 511 F. Supp. 3d 1006, 1027-29 (N.D. Cal. 2021) (Sherman Act § 1, Clayton Act § 7, and
 26 California claims). All three citations related to sufficiency of the allegations to establish market
 27 power, not antitrust injury. *Bio-Rad Labs.*, 483 F. Supp. 3d at 59-60; *Intel Corp.*, 511 F. Supp. 3d

1 at 1024, 1029; *Top Rank, Inc. v. Haymon*, 2015 WL 9948936, at *8 (C.D. Cal. Oct. 16, 2015).

2 **3. Dark Catt Alleges Non-Price Injuries**

3 Finally, Valve shadowboxes other injuries it thinks Dark Catt may be using to establish
 4 antitrust injury, including injuries to consumers. Mot. at 12-13. Dark Catt establishes antitrust
 5 injury with its allegations related to Publishers' overpayment. It also plausibly alleges harm
 6 stemming from reduced "output, quality, innovation, or choice." *Id.* at 13 (asserting, without
 7 support, that these injuries are "conspicuously absent"). Dark Catt alleges that Valve uses Steam
 8 keys to artificially restrict supply of Steam-based games available for sale on other stores, Compl.
 9 ¶ 154, "just as any other monopolist reduces output below the competitive level to charge a
 10 supracompetitive price." *Thompson v. Clear Channel Commc'ns, Inc.*, 247 F.R.D. 98, 151 (C.D.
 11 Cal. 2007) (finding that plaintiffs pled antitrust injury in alleging "they have suffered injury in the
 12 form of the payment of supra-competitive prices" which "flow[s] from the illegal anticompetitive
 13 effect of Defendants' conduct allowing it to engage in monopolistic pricing practices"). This is
 14 clearly a harm from reduced output in the market as a whole.

15 The Complaint further explains how Valve's conduct reduces quality, innovation, and
 16 choice, injuring Publishers and consequently consumers. For example, if Publishers were able to
 17 keep a higher amount of their sales revenue or negotiate upfront payments for exclusives, they
 18 could "pour more money into innovation" and "invest in additional development resources" to
 19 increase the quality and quantity of games. Compl. ¶¶ 10, 49, 140. Without Valve's restrictions,
 20 Publishers could, for example, sell their games at lower prices on other stores, helping those stores
 21 gain traction in the market. This would increase Publishers' and consumers' choices for selling
 22 and buying PC games and encourage more innovative delivery systems due to Steam and rival
 23 stores competing to distribute Publishers' games and keep users' attention. *Id.* ¶¶ 11, 22, 135, 199.

24 In sum, Dark Catt alleges antitrust injury based on paying Valve a commission rate higher
 25 than the rate that would have prevailed if Valve had not used a pattern of anticompetitive conduct
 26 to exclude rivals. Valve's attempts to rewrite Dark Catt's factual allegations and its reliance on
 27 distinguishable cases do not show the alleged antitrust injury is implausible or insufficient.

B. Dark Catt Alleges Valve Has Market Power in the Relevant Market

1. Valve's Factual Attack on the 75% Market Share Is Unavailing

Valve claims to attack the sufficiency of Dark Catt’s market power allegations but its dispute is solely with one portion of one source the Complaint cites for Valve’s market share, which in turn is only one part of Dark Catt’s market power allegations. Mot. at 13-14 (discussing the source “Arthur Zuckerman, *75 Steam Statistics: 2020/2021 Facts, Market Share & Data Analysis*, Compare Camp (May 15, 2020), <https://comparecamp.com/steam-statistics>” (“*75 Steam Statistics*”) cited in Compl. ¶ 5 n.3). Steam admits that this source, by a market researcher focused on product comparisons, states ““Steam is the world’s largest distributor of PC games, taking up 75% of the global market share.””). *Id.* at 14 (quoting *75 Steam Statistics*). That should be the end of the market power inquiry at the pleading stage.

Indeed, the 75% market share is a factual matter that must be taken as true at this stage. See *Newcal Indus. v. Ikon Office Sols.*, 513 F.3d 1038, 1044 (9th Cir. 2008) (stating that the “relevant market” is a factual element under Rule 12(b)(6)); *Advanced Health-Care Serv. v. Radford Cnty. Hosp.*, 910 F. 2d 139, 147 (4th Cir. 1990) (stating that the plaintiff’s market share “factual allegations . . . must be accepted as true” on a motion to dismiss). Valve does not seriously dispute the accuracy of the number or its use by Dark Catt. Instead it searches for other market share estimates with no basis in the Complaint—or relation to Dark Catt’s unchallenged market definition—that it would like the Court to credit in place of Dark Catt’s well-pleaded market power allegations. This is impermissible. See *Khoja*, 899 F.3d at 1006.

While the foregoing should dispose of the issue, Valve complains that the underlying data is not provided, and that there is no source. To the contrary, a list of sources is provided at the end of the full article and in graphics throughout, as Valve knows because it relies on one of these cited sources to present its preferred, contrary market share estimate. Mot. at 14 (“when one looks to the sources that website [75 *Steam Statistics*] lists, one sees that the author drew ‘over \$4 billion worth of sales’ from an article . . . cited as note 20 in 75 *Steam Statistics*” and then discussing “the latter article”). Dark Catt can reasonably rely on a market share figure provided by an industry

1 researcher that accords with all its other allegations about Valve’s dominance without needing to
 2 provide more data underlying the statistic. Valve attempts to erect an impossible standard for a
 3 plaintiff to adequately state a claim without full discovery from the defendant and other industry
 4 participants. *See FTC v. SureScripts LLC*, 424 F. Supp. 3d 92, 103-04 (D.D.C. 2020) (such factual
 5 denials “speak to the merits and the need for further factual development through discovery”).
 6 Dark Catt has provided a reliable market share estimate to support its claims.

7 **2. Dark Catt Includes Significant Other Market Power Allegations**

8 Dark Catt’s market power allegations, moreover, do not solely depend on the 75% market
 9 share allegation, even though it is a material factual allegation that the Court should accept as true.
 10 Valve’s Motion says nothing about Dark Catt’s other allegations, summarized below, that
 11 plausibly suggest Valve has substantial power in the relevant market.

12 “Market power may be demonstrated through either of two types of proof”: direct proof of
 13 injury to competition, *i.e.*, “evidence of restricted output and supracompetitive prices,” or
 14 circumstantial evidence related to the market structure, namely, defining a relevant market,
 15 showing the defendant’s dominant share of the market, and showing significant barriers to entry
 16 and competitors’ inability to increase their output in the short term. *Rebel Oil Co. v. Atl. Richfield*
 17 *Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). The Complaint includes both types of evidence.

18 For direct proof of injury to competition, Dark Catt details how Valve restricts output by
 19 limiting the sales of third-party stores selling Steam keys to ensure that they remain below Valve’s
 20 sales for the same game. Compl. ¶¶ 152-54. Most other stores are selling Steam keys, giving Valve
 21 control over total market output. *Id.* ¶ 156. And the Complaint shows that Valve is able to charge
 22 supracompetitive commissions because its anticompetitive conduct leaves no adequate
 23 alternative—not reliant on Steam directly or indirectly—for Publishers to distribute their PC
 24 games. Numerous companies have attempted to enter the market but have been unable to make a
 25 meaningful dent in Valve’s dominance because of Valve’s conduct, despite offering lower
 26 commission rates and other more favorable distribution terms. *Id.* ¶¶ 63, 119, 122-24.

1 As circumstantial evidence, Dark Catt alleges a relevant market of worldwide PC game
 2 distribution, which Valve does not challenge. Dark Catt alleges numerous facts about Valve's
 3 dominant share of that market, beyond the 75% market share figure:

- 4 • "largest distributor of PC games," generating "over \$4 billion worth of sales" in 2017 with
 5 "120 million monthly active players," *id.* ¶ 5;
- 6 • "\$10 billion market capitalization" with Steam as "largest source of revenue," *id.* ¶ 6;
- 7 • Epic, its biggest competitor, sold \$265 million of third-party games in 2020, *id.* ¶ 64;
- 8 • "ensuring Steam keys remain the industry standard," *id.* ¶ 13;
- 9 • EA started selling its games on Steam after nine years of using only its own store to "be
 10 where the players are," *id.* ¶ 68.

11 And the Complaint shows significant barriers to entry, including financial barriers like credit card
 12 fraud and initial capital outlays, economies of scale, existing and entrenched user bases, and
 13 Valve's control over the technology standard used in the industry. *Id.* ¶¶ 117, 119, 122, 125, 155-
 14 57. These allegations are more than sufficient to plead Valve's market power.

15 **3. Two of the Three Claims Do Not Require Market Power**

16 Valve likewise does not explain why a failure to allege market power means "the Court
 17 should dismiss the Complaint for that reason alone," Mot. at 15, when neither Count Two nor
 18 Count Three of Dark Catt's Complaint requires market power as an element of the claim. *Spectrum*
 19 *Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993) (elements for Sherman Act § 2 attempted
 20 monopolization claim); *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013)
 21 (elements for Washington Consumer Protection Act claim).

22 **4. Valve Cannot Introduce Its Own Market Share Figure**

23 As noted, Valve's factual dispute with Dark Catt's 75% market share allegation comes
 24 from a different statement in an article cited in the Complaint. Compl. ¶ 5 n.3 (citing *75 Steam*
 25 *Statistics*).⁷ Valve points to a statement in *75 Steam Statistics* that relates to a different metric

26 ⁷ Valve does not explain how the article is incorporated by reference in the Complaint or otherwise
 27 properly before the Court. A court may consider a document outside the complaint only if incorporated
 28 by reference because either (1) "the complaint refers to it extensively" or (2) the document itself forms

1 (“more than 18% of PC game sales worldwide without taking in-game purchases into account”).
 2 Mot. at 14. To prop up this other metric, it asks the Court to take a “closer look” at a separate
 3 article cited within *75 Steam Statistics* that is supposedly the source for the 18% figure. *Id.* (quoting
 4 the second article that is not referenced in the Complaint or provided with Valve’s Motion).

5 Now two steps removed from the Complaint, Valve points to a revenue figure “from some
 6 unnamed source” from which the 18% figure is apparently calculated. *Id.* The unnamed source has
 7 further qualified its estimate with the caveats “[i]f the numbers are right” and that the percentage
 8 is “likely far more than that once in-game purchases are accounted for.” *Id.* (quoting the second
 9 article). Yet Valve contends this mysterious “18% or more” calculation “eviscerates Plaintiffs’
 10 75% allegation,” which, to recap, is based on the market researcher’s original article. *Id.*

11 Further undermining Valve’s argument, this alternative 18% figure does not correspond to
 12 the relevant market Dark Catt alleges. It looks at Valve’s (generally 30%) cut of the revenues from
 13 sales on Steam, not total sales on Steam. *Id.* (explaining, via impermissible sources outside the
 14 Complaint, that the 18% figure is based on Valve’s “\$4.3 billion worth of sales,” *i.e.*, Valve’s total
 15 sales commissions, not the total sales of PC games made on Steam). And it admittedly “doesn’t
 16 include revenue generated by DLC [downloadable content] or microtransactions,” *id.* (quoting the
 17 second article), although these transactions are included in Dark Catt’s relevant market. *See*
 18 Compl. ¶¶ 50-54 (discussing importance of revenues from DLC).

19 Valve does not provide any legal basis for its extrinsic and speculative “analysis.” *See*
 20 *Khoja*, 899 F.3d at 998 (warning against “pil[ing] on numerous documents to [defendants’]
 21 motions to dismiss to undermine the complaint” to try to “resolve competing theories against the
 22 complaint”). Valve requests the Court not only look at a document outside the Complaint and
 23 accept the truth of a vague statement made there, but also replace Dark Catt’s well-pleaded factual
 24 allegations with this one vague statement.

25
 26
 27 the basis of the claim. *Choker v. Pet Emergency Clinic, P.S.*, 2021 WL 934037, at *3 (E.D. Wash. Mar.
 28 11, 2021) (citing *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003)). The *75 Steam Statistics*
 article fits neither, and the other article Valve uses has no connection to the Complaint.

1 **5. The *Facebook* Opinion Does Not Help Valve’s Argument**

2 The recent *Facebook* opinion has no relevance to Dark Catt’s market power allegations.

3 The FTC’s relevant market of personal social networking was “idiosyncratically drawn” and “thin”
 4 in factual allegations so the court “demand[ed] something more robust” from the market-share
 5 allegations. *FTC v. Facebook, Inc.*, 2021 WL 2643627, at *12 (D.D.C. June 28, 2021). Its market
 6 share allegations, which “d[id] not even provide an estimated actual figure or range” for
 7 Facebook’s share at any time during the ten-year period at issue, were insufficient to plausibly
 8 establish Facebook’s market power. *Id.* Here, in contrast, the market share is measured by revenue,
 9 Mot. at 14, a “typical metric” for a “more traditional goods market” like the distribution of PC
 10 games, sold as individual units at non-zero prices. *Facebook*, 2021 WL 2643627, at *1.

11 **C. Dark Catt Plausibly Alleges Valve’s Anticompetitive Conduct**

12 Valve additionally challenges whether Dark Catt plausibly alleges that Valve engaged in
 13 anticompetitive conduct. *See* Mot. at 15-24.⁸ As with Valve’s arguments on injury and market
 14 power, its contention that Dark Catt has not plausibly alleged anticompetitive conduct fails for
 15 attempting to introduce and rely on facts outside the Complaint, disaggregate Dark Catt’s well-
 16 pled factual allegations, and mischaracterize the legal issues.

17 Just as courts evaluating a motion to dismiss must accept the facts pled in a complaint as
 18 true and draw all reasonable inferences in favor of the non-moving party, they must read the
 19 complaint as a whole in evaluating its sufficiency. This is particularly true for fact-intensive
 20 monopolization claims, where the alleged acts must be analyzed in the aggregate. *Free FreeHand*
 21 Corp., 852 F. Supp. 2d at 1184 (“The allegations of anticompetitive acts, and their alleged
 22 aggregated anticompetitive effect, fall squarely within the bounds of established monopoly broth
 23 theory.”); *Cal. Energy Co. v. S. Cal. Edison Co.*, 1992 WL 330263, at *2 (N.D. Cal. Sept. 22,
 24 1992) (explaining monopolization allegations “should not be dissected as individual acts, as the . . .

25
 26

 27 ⁸ To the extent Valve attempts to rely on arguments made in its motion to dismiss the *Wolfire*
 28 Complaint, this is improper. *See* Mot. at 15 (“As in *Wolfire*”; “Valve showed in the *Wolfire* MTD”;
 “*Wolfire*, and now Dark Catt, seeks to enjoy the benefits of Steam Keys”); *id.* at 19 (“Valve showed in the
Wolfire motion to dismiss”).

1 defendants assert, but rather must be viewed as a whole”).

2 A defendant’s purported business rationales for a challenged practice also are not proper
 3 considerations on a motion to dismiss. *See SmileCare Dental Grp. v. Delta Dental Plan of Cal.,*
 4 *Inc.*, 88 F.3d 780, 786 (9th Cir. 1996) (finding “the existence of valid business reasons is ordinarily
 5 a question of fact” and departing from the rule only because the policy at issue was “supported as
 6 a matter of law by a legitimate business justification” by a prior decision). And the actual legal
 7 theory pled in the complaint should be analyzed, not a straw man erected by the defendant. *See,*
 8 *e.g., In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 692 (S.D.N.Y. 2012) (denying motion
 9 to dismiss where defendants’ “contentions misconstrue the nature of” the alleged wrongdoing).

10 Under the proper pleading standard, there is no question Dark Catt plausibly alleges that
 11 Valve engaged in anticompetitive conduct in the PC game distribution market. Valve controls
 12 Publishers’ pricing, marketing, and other activities on rival stores competing to sell the same
 13 games available on Steam. Compl. ¶ 9. Publishers are prohibited from selling their games and DLC
 14 for lower prices to consumers on rival stores. *Id.* ¶¶ 9-11. They are similarly prohibited from
 15 making their games, updates, or add-on content available through a third-party store earlier than
 16 they are available on Steam, preventing any exclusive offerings with other stores. *Id.* ¶¶ 46-48, 50-
 17 53. Valve’s restrictions are, in practice and effect, a most favored nation (“MFN”) provision
 18 designed to limit competition between Steam and its rivals, to Steam’s sole benefit. *Id.* ¶ 54.

19 Valve also uses Steam keys to enforce its restrictive pricing and marketing terms and to
 20 monitor and control Publishers. *Id.* ¶ 12. It has worked to make Steam keys the accepted industry
 21 standard for distribution of digital copies of games, keeping Publishers reliant on Steam. *Id.* ¶ 58.
 22 Steam keys also provide Valve data about Publishers’ sales through other stores and authority to
 23 limit the number of sales Publishers can make in those stores. *Id.* ¶¶ 13-14. In another prong of its
 24 anticompetitive scheme, Valve uses its control of the publicity and visibility of games on Steam
 25 to keep Publishers in check, including by banning Publishers or games with little or no
 26 investigation of alleged wrongdoing and allowing review bombing, *i.e.*, failing to remove negative
 27 reviews unrelated to a game, when Publishers utilize alternative stores. *Id.* ¶¶ 16-17.

1 **1. Dark Catt Adequately Explains the Role of Steam Keys in Valve’s Scheme**

2 Valve focuses most of its Steam key argument on its contention that “it has no duty to give
 3 away free Steam Keys.” Mot. at 19. This misses the point. Dark Catt does not allege that Valve
 4 had a duty to provide Steam keys. But once it has made that decision, and encouraged keys to be
 5 used as an industry standard to distribute PC games, Compl. ¶¶ 13, 125, 148-49, 157, Valve cannot
 6 use the keys to gain or maintain its monopoly. *See Aspen Skiing Co. v. Aspen Highlands Skiing*
 7 *Corp.*, 472 U.S. 585, 600-01 (1985) (a monopolist’s refusal to deal may “give rise to liability”
 8 because “the right to refuse to deal with other firms does not mean that the right is unqualified”);
 9 *Lorain J. Co. v. United States*, 342 U.S. 143, 155 (1951) (a monopolist’s claimed right to select its
 10 customers “is neither absolute nor exempt from regulation. Its exercise as a purposeful means of
 11 monopolizing interstate commerce is prohibited by the Sherman Act.”).

12 Valve’s contention that Steam keys are free is similarly irrelevant to Dark Catt’s claims.⁹
 13 Even so, Valve cannot use them to exclude Publishers and rivals from the PC gaming market so
 14 that Valve can maintain its monopoly position and extract greater profits. *See, e.g., United States*
 15 *v. Microsoft Corp.*, 253 F.3d 34, 61 (D.C. Cir. 2001) (holding that overall conduct to put up
 16 obstacles for users to download and access a rival’s product was exclusionary conduct that violated
 17 § 2 of the Sherman Act). Here, Valve does not merely put up obstacles for certain Publishers to
 18 gain access to Steam keys, but delays or removes access to Steam keys altogether.

19 Its claims of offsetting procompetitive justifications for its Steam key restrictions,
 20 including preventing free-riding, have no place in deciding a motion to dismiss. This is a factual
 21 issue to be determined on a full record. *See FTC v. Qualcomm Inc.*, 969 F.3d 974, 991 (9th Cir.
 22 2020) (describing “three[-]part burden-shifting test under the rule of reason”: “if a plaintiff
 23 successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then
 24 the monopolist may proffer a ‘procompetitive justification’ for its conduct”) (citation omitted).

25
 26

 27 ⁹ Because Dark Catt does not plead this fact, Mot. 15 (“Dark Catt never mentions that Valve doesn’t
 28 charge developers for Steam Keys”), Valve cannot rely on it on a motion to dismiss. *See Twombly*, 550
 U.S. at 572; *Khoja*, 899 F.3d at 1002 (defendants may not “insert their own version of events into the
 complaint to defeat otherwise cognizable claims”).

1 The same is true of its arguments about Dark Catt's examples of Valve delaying Steam key
 2 authorizations to punish Publishers and limit sales on third-party sites. Mot. at 17-19. Its "response
 3 is largely factual, denying the [plaintiff's] allegations," which "are not adequate grounds for
 4 dismissing" a complaint. *SureScripts*, 424 F. Supp. 3d at 103-04. Valve goes further, providing its
 5 alternative facts, legal interpretation, and then claiming that the one example does not state a claim.
 6 Mot. at 18 ("Dark Catt's allegations about *Ark* do not state a claim."). That of course is not the
 7 pleading standard; Valve cannot dissect each allegation and say each is insufficient standing alone.
 8 *See Tele Atlas N.V. v. NAVTEQ Corp.*, 2008 WL 4911230, at *2 (N.D. Cal. Nov. 13, 2008).

9 **2. Dark Catt Pleads that Valve's Pricing and Marketing Provisions Form an
 10 Anticompetitive MFN**

11 Valve also argues that its various contractual restraints do not amount to an
 12 "anticompetitive MFN" because "[s]eeking the best price for your customers can be the essence
 13 of competition." Mot. at 19 (citing *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue*
 14 *Shield of R.I.*, 883 F.2d 1101, 1113 (1st Cir. 1989)). But this is not what Valve's MFN is doing.
 15 Valve gets the law wrong, and impermissibly relies on extrinsic facts and mischaracterization of
 16 Dark Catt's allegations to make its argument.

17 Dark Catt alleges that Publishers contractually agree that if they are going to make a game
 18 available on Steam also available on another store, they will make the game and any DLC or add-
 19 on content available at the same price and at the same time on Steam. Compl. ¶¶ 46-62. Valve
 20 cannot run from its own language:

- 21 • The Publisher must maintain "material parity" between DLC offered to Steam users and
 22 users on other stores "who make a comparable investment in the [game] and the associated
 23 DLC," Mot. at 21-22 (quoting SDA § 2.4);
- 24 • "It is important that you don't give Steam customers a worse deal," Compl. ¶ 59;
- 25 • "It's OK to run a discount on different stores at different times as long as you plan to give
 26 a comparable offer to Steam customers within a reasonable amount of time," *id.*;

1 • “Keep in mind that the perceived price in the bundle/subscription should be a price you are
 2 willing to run the game at a standalone price or discount on Steam,” *id.*

3 Dark Catt alleges that industry participants understand that Valve means pricing parity and
 4 enforces the agreements in this way. *Id.* ¶ 60. Contrary to Valve’s claims, Dark Catt explains in
 5 detail how the provisions function together to prevent Publishers from obtaining better distribution
 6 terms from competing stores. *See Compl.* ¶¶ 128-43 (explaining how delivery provision, DLC
 7 provision, and pricing provisions harm competition generally and Publishers specifically).

8 Valve again takes Dark Catt’s MFN allegations out of context and supplants them with its
 9 own “facts.” It takes issue with the Complaint’s quote of a tweet from Epic CEO Tim Sweeney as
 10 “not a factual allegation,” but then asks the Court to consider a reply tweet by some other user as
 11 a fact that negates Dark Catt’s allegations. Mot. at 20.¹⁰ This is improper procedurally and
 12 substantively. Similarly, the “instances of developers entering into exclusive offerings with other
 13 stores,” *id.*, meant they could not offer their games on Steam during this period, and resulted in
 14 great backlash from users. None of this shows that “[c]ompetition abounds.” *id.*

15 Valve’s attempt to analogize the facts of this case to *Ocean State* falls flat. *Ocean State*
 16 involved a post-trial judgment, not a motion to dismiss. 883 F.2d at 1102. And the defendant’s
 17 MFN ensured that it would receive the lowest price from its suppliers. *Id.* at 1103-04. By contrast,
 18 Valve’s MFN guarantees nothing about its own costs (the commissions it pays its suppliers—
 19 Publishers). The MFN operates on transactions between Publishers and purchasers, not Valve’s
 20 own purchases. The MFN chills competition between Valve and its rivals by preventing Publishers
 21 from offering better deals to consumers through rival distributors, which in turn forestalls their
 22 meaningful and effective competition. *See United States v. Delta Dental of R.I.*, 943 F. Supp. 172,
 23 176-78 (D.R.I. 1996) (distinguishing *Ocean State*); *see also United States v. Blue Cross Blue*
 24 *Shield of Mich.*, 809 F. Supp. 2d 665, 674 (E.D. Mich. 2011) (denying motion to dismiss claims

25
 26 ¹⁰ Dark Catt alleges that the Steamworks Documentation applies to “Steam-hosted game[s]” *Compl.*
 27 ¶ 58; *also id.* ¶ 62, and acknowledges Epic does not sell Steam keys, *id.* ¶ 61. Valve’s contention that
 28 Dark Catt makes false claims, Mot. at 19-20, is misplaced. Dark Catt alleges that most other stores are
 29 selling Steam keys, and that Valve’s anticompetitive MFN still affects pricing on Epic Games Store, as
 30 Epic’s CEO stated. *Compl.* ¶¶ 61-62 & n.13, 122-24, 150, 161.

1 where plaintiffs explained how MFNs could exclude entry and competition in relevant market; “a
 2 factual inquiry and, ultimately, a balancing of anticompetitive and procompetitive effects must be
 3 made but not at the pleading stage”).

4 Courts recognize that in certain contexts, MFNs “can be misused to anticompetitive ends.”

5 *United States v. Apple, Inc.*, 791 F.3d 290, 320 (2d Cir. 2015) (internal quotes and citation
 6 omitted); *see Staley v. Gilead Scis., Inc.*, 446 F. Supp. 3d 578, 609-12 (N.D. Cal. 2020) (discussing
 7 contractual provisions that were “basically” MFN clauses and denying motion to dismiss); *Blue*
 8 *Cross & Blue Shield of Ohio v. Bingaman*, 1996 WL 677094, at *4 (N.D. Ohio June 24, 1996)
 9 (MFN clauses may be illegal if defendants have anticompetitive intent or lack legitimate business
 10 justifications). This is a fact-specific determination inappropriate on a motion to dismiss.

11 3. Dark Catt Alleges Valve Uses the Review System as Part of Its Scheme

12 Valve lastly argues that customer reviews are not anticompetitive. Mot. 22-24. Here, too,
 13 Valve errs in addressing one type of conduct in isolation. *See Am. Nat'l Mfg. v. Select Comfort*
 14 *Corp.*, 2016 WL 9450472, at *3 (C.D. Cal. Sept. 28, 2016) (rejecting argument that “focuse[d] on
 15 isolated conduct and d[id] not consider this conduct as part of a larger, allegedly monopolistic
 16 scheme”). Dark Catt does not allege Valve has a generalized duty to moderate reviews. It does
 17 allege, in detail, how Valve uses customer reviews as part of its anticompetitive scheme.

18 Valve’s arguments over individual examples do not undermine Dark Catt’s allegations.
 19 Dark Catt explains Valve’s affirmative conduct in using the review system to punish Publishers.
 20 *See* Compl. ¶¶ 172 (“Valve issued a statement criticizing the exclusive, calling the decision ‘unfair
 21 to Steam customers,’ and posted the statement on Metro Exodus’s Steam store page. ‘This led to
 22 a bunch of negative review spamming on the previous Metro games’); 178 (average reviews for
 23 the two Metro games dropped from 89% positive to 46% and 90% to 43%). And Dark Catt explains
 24 the effect of Valve’s policy not to moderate reviews. It does not delete the reviews; at most it gave
 25 itself the discretion to mark some as “off topic,” but even then does not remove the reviews. *Id.*
 26 ¶¶ 182-85. Dark Catt is not seeking to impose “a standard of censorship,” Mot. at 22; these reviews
 27 violate Valve’s own rules of conduct, but Valve does not take action because the predictability of

1 retaliation by Steam users against Publishers who use other stores disciplines Publishers and keeps
 2 them dependent on Valve, reinforcing Valve's monopoly. Compl. ¶¶ 17-19, 181-86.

3 In short, Dark Catt plausibly alleges Valve's anticompetitive conduct through its factual
 4 allegations that Valve used a variety of contractual provisions and non-contractual tools to prevent
 5 Publishers from selling their games through a rival storefront at better prices or with better non-
 6 price features. Proving liability will require a fact-specific determination of Valve's conduct and
 7 its impact on the market, but at the pleadings stage, nothing else is required. *See REX - Real Est.*
 8 *Exch. Inc. v. Zillow Inc.*, 2021 WL 3930694, at *5 n.5 (W.D. Wash. Sept. 2, 2021) (on a 12(b)(6)
 9 motion, court evaluates whether challenged conduct plausibly exerts an unreasonable restraint on
 10 trade and does not consider or balance any claimed procompetitive justifications); *Sitzer v. Nat'l*
 11 *Ass'n of Realtors*, 420 F. Supp. 3d 903, 915 (W.D. Mo. 2019) (same).

12 **D. Dark Catt States a Claim Under the Washington CPA**

13 Valve's only challenge to Dark Catt's Washington Consumer Protection Act claim is that
 14 it has the same deficiencies as the Sherman Act claims. This argument accordingly fails for the
 15 reasons above.

16 **V. CONCLUSION**

17 Dark Catt respectfully requests that the Court deny Valve's motion to dismiss the Dark
 18 Catt Complaint.

19 Dated: October 8, 2021

20 By: s/ Stephanie L. Jensen

21 Stephanie L. Jensen, WSBA #42042
 22 **WILSON SONSINI GOODRICH & ROSATI, P.C.**
 23 701 Fifth Avenue, Suite 5100
 24 Seattle, WA 98104-7036
 25 Telephone: (206) 883-2500
 26 Facsimile: (206) 883-2699
 27 Email: sjensen@wsgr.com

28 Kenneth R. O'Rourke (*pro hac vice*)
 29 Scott A. Sher (*pro hac vice*)
 30 Allison B. Smith (*pro hac vice*)
 31 **WILSON SONSINI GOODRICH & ROSATI, P.C.**
 32 1700 K Street, NW, Suite 500

1 Washington, DC 20006
2 Telephone: (202) 973-8800
3 Facsimile: (202) 973-8899
4 Email: korourke@wsgr.com
Email: ssher@wsgr.com
Email: allison.smith@wsgr.com

5 W. Joseph Bruckner (*pro hac vice*)
6 Joseph C. Bourne (*pro hac vice*)
7 Leona B. Ajavon (*pro hac vice*)
8 **LOCKRIDGE GRINDAL NAUEN P.L.L.P.**
9 100 Washington Avenue S, Suite 2200
10 Minneapolis, MN 55401
11 Telephone: (612) 339-6900
Facsimile: (612) 339-0981
Email: wjbruckner@locklaw.com
Email: jcbourne@locklaw.com
Email: lbajavon@locklaw.com

12 *Attorneys for Plaintiffs Dark Catt Studios*
13 *Holdings, Inc. and Dark Catt Studios*
14 *Interactive LLC, and Putative Class*